IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 17 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GOPALJI LAXMANJI RATHOD

Versus

STATE OF GUJARAT

Appearance:

MR MP SHAH for Petitioner

MR SAMIR J DAVE for Respondents

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 17/04/2001

ORAL JUDGEMENT

#. Heard the learned counsel for the parties.

#. This matter is sent by the petitioner from jail. In this petition he has challenged the order dated 28-9-2000 of the Sub-Divisional Magistrate at Mahesana under which

he was ordered to be kept under police custody at Special Jail, Porbandar for two years from 24-7-2000. Sub-Divisional Magistrate, Mahesana under his order dated 24-7-2000 ordered for externment of the petitioner for two years from Districts Mahesana, Patan, Kheda, Banaskantha, Ahmedabad (Rural) and Gandhinagar. This order has been accepted by him as what Mr. Shah states that against this order, the petitioner has not filed any appeal. He violated the term of the order of externment, meaning thereby, without prior permission of the authority, he entered in the prohibited area and the Sub-Divisional Magistrate at Mahesana while exercising powers as conferred upon him under subsection (2) of section 62 passed the impugned order.

#. Learned counsel for the parties are in agreement that this order has been passed by Sub-Divisional Magistrate, Mahesana without furnishing to the petitioner a copy of the police report, sr. no. 2 referred in the order and without giving notice and an opportunity of hearing. It is the contention of the learned counsel for the respondents that when externee enters in the prohibited area without prior permission of the authority, consequences thereof is to keep him in police custody and before passing of this order, the Act under which this order has been passed nowhere contemplates to give any notice and an opportunity of hearing to the externee.

#. Subsection (2) of section 62 of the Bombay Police ACt, 1951, reads as under:

> 2. The authority making an order under section 55, 56, 57 or 57A may in writing permit any person in respect of whom such order has been made to enter or return to the area, including any contiguous districts or part thereof or to the specified area or areas, from which he was directed to remove himself, for such temporary period and subject to such conditions as may be specified in such permission and may require him to enter into a bond with or without surely for the due observance of the conditions imposed. The authority aforesaid may at any time revoke any such permission. Ay person who with such permission enters or returns to such area, district or part thereof or to such specified area shall observe the conditions imposed, and at the expiry of the temporary period for which he was permitted to enter or return, or on the

> earlier revocation of such permission shall remove himself outside such area, or the area and any contiguous districts or part thereof, or outside such specified area or areas and shall not enter therein or return thereto within the unexpired residue of the period specified in the original order made under section 55, 56, 57 or 57A without a fresh permission. If such person fails to observe any of the conditions imposed, or to remove himself accordingly, or having so removed himself enters or returns to the area, or the area and any contiguous districts or parts thereof or to the specified area or arrest, without fresh permission, the authority concerned may cause him to be arrested and removed in police custody to such place outside the areas and district or part thereof or outside the specified area or areas, as the case may be, as that authority may in each case prescribe.

In this provision the word `may' is there and therefrom it can reasonably inferred, as contrary has not been shown by the counsel for the respondents, that in all the cases of violation of condition of externment order, inevitable result thereof is the order of police custody of the externee. It is the discretion of the authority and in-built obligation is there on the authority which can reasonably be read in the provision to give an opportunity to the externee to explain his case. In this case, I find that the petitioner has given out the reason for his unavoidable requirement to enter into prohibited area. Reference here may have to para-3 of this application which reads as under:

> 3. In the meantime, I telephoned to my sister at Mahesana. So I came to know from my sister that my mother is very sick and the financial condition is not good. So I was to return to Bhavnagar (Anandnagar) after making arrangement for giving proper treatment to my mother. I was not knowing legally that I should not enter in the area of externment even at the time of sickness of an elder person and I entered.

This explanation given by the petitioner for his entry in the prohibited area without prior permission of the authority may or may not be correct but an opportunity has to be given to him for explanation and after considering the explanation, the authority has to pass an appropriate order in accordance with law. It cannot be

taken that in all the cases the externees may come up with concocted and manufactured explanation. The explanation given by the petitioner, if is true, his entry in the prohibited area may not be taken to be so serious where he has to be ordered to be taken into police custody. He received the message from his sister re. sickness of his mother and so for arrangement of proper treatment of his mother he entered the prohibited area. It is further stated by him that he was not knowing the legal position that he can enter in the prohibited area only after taking prior permission of the competent authority.

#. It is also against the basic principles of natural justice and fairplay to send a person behind the bars without giving any opportunity of hearing. The order passed by the Sub-Divisional Magistrate, Mahesana under subsection (2) of section 62 of the Act may not be an administrative one though finally nothing can be said and it is not necessary to say, prima-facie, it appears to be a quasi-judicial order. The consequence thereof is also very serious, meaning thereby, the petitioner's liberty is affected as he has to be sent in jail. It is a settled principle of law that before any material is used against a person to deny him his personal liberty he has to be furnished with the copy of that adverse material and to give him an opportunity to place his objections against the same. Here, the Sub-Divisional Magistrate, Mahesana has acted on the police report and admittedly the copy of that report has not been furnished to the petitioner. However, in this matter, that aspect may not be that much of serious for the reason that the petitioner's entry in the prohibited area was without prior permission of the Sub-Divisional Magistrate, Mahesana. There is yet another ground on which this petition deserves acceptance. Shri Shah learned counsel for the petitioner placed reliance on the decision of this Court in the case of Rameshji P. Thakor vs. State reported in 2001 (1) GLR 171 and contended that the petitioner even if he entered in the prohibited area without prior permission of the Sub-Divisional Magistrate, Mahesana, he may be arrested and removed from the area and he may be prosecuted under section 142 of the Act but he cannot be without trial be placed in the custody. I have given my thoughtful consideration to this contention and I am satisfied that this judgment helps the petitioner. From this judgment, it is clear that unless the externee is prosecuted and punished for this violation of condition of externment, he cannot be placed in the custody. As this matter is squarely covered by the decision of this Court otherwise also, no

further discussion is called for in the matter.

#. As a result of the aforesaid discussion, this petition succeeds and the same is allowed and the order No.Mag/Ext/Case/Vashi/2295/2000 dated 28-9-2000 of the Sub-Divisional Magistrate, Mahesana is quashed and set aside. The petitioner - Gopalji Laxmanji Rathod at present in Special Jail, Porbandar, be set at liberty forthwith if he is not required in any other case. Rule is made absolute.

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